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ABSTRACT

Based on the alleged growth in the number of families seeking unapproved alternative schooling arrangements, this paper reviews related state legislation and court litigation. Both home schooling and small, unapproved private schools are discussed. According to the paper, in virtually every state, enforcement of minimum standards for private education comes through compulsory attendance laws, which nevertheless vary greatly. Some states require certification of teachers and schools, some only approval, and some only minimal evidence that schooling takes place. The courts have struck down state laws forbidding private education. They have also indicated that in particular situations some families can be excused from an otherwise constitutional compulsory attendance law. In state court litigation concerning the legitimacy of religious schools, court findings have varied greatly, sometimes emphasizing the interests of the state and sometimes the individual's interest in the free exercise of religion. The authors suggest that because of the growth of alternative educational arrangements, the states with the strictest laws may soon be faced with challenges to their compulsory attendance regulations. Limited testing suggests that most alternatives are educationally adequate. The authors conclude by suggesting several provisions to reassure educators opposed to relaxed compulsory schooling laws. (Author/JM)

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PRIVATE EDUCATION ALTERNATIVES AND STATE REGULATION

Working paper, August 1981

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It is generally acknowledged that a good education is crucial to a child's future economic success and even personal happiness. However, a growing number of people believe that schooling is not necessarily equivalent to education, and does not produce the desired results for every child. Parents who feel public schools are somehow missing the mark sometimes decide to enroll their children in private schools or teach them at home. In most states parents who decide to teach their children in settings which have not received state approval risk not only criminal charges under the state's compulsory attendance law, but also possible fines and jail sentences and other forms of legal compulsion. Such sanctions take their toll in other ways as well. Utah polygamist John Singer was shot and killed by law officers outside his home two years ago. These officers were investigating a charge that Singer had failed to abide by his obligations under the state's compulsory attendance law.

Such cases pose difficult questions for education policymakers: Is compulsory attendance a sufficiently important interest to justify leveling the full artillery of the state, including criminal sanctions, against parents who, for the most part, are doing what they believe to be in the best interest of their children? What is happening to these children? Are they learning the fundamental skills necessary for citizenship and for self-sufficiency when they become adults? What are the long range implications of large numbers of the population insulating themselves from the mainstream of society? Is "rugged individualism" still an American ideal, or do the practicalities of the twentieth century require greater social conformity and cooperation than has been necessary in the past? Are private education alternatives no more than havens for those wishing to avoid racially integrated public schools? What are the financial implications of this new phenomena for local school districts, who depend upon state aid based upon their public school enrollment? What is the societal cost of jailing parents who break the law and defy court orders for reasons of conscience and because, acting in good faith, they believe their children are better off outside of the state-approved education network.

Despite the serious personal consequences for parents and children, in the last few years there has been a dramatic increase

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in litigation involving families who have sought unapproved education alternatives. Many parents have received fines or jail sentences for their choices. The ultimate consequences usually depend upon the degree of flexibility in state laws and regulations and vigor with which local officials enforce the state requirements. In almost every state the local superintendent or board, and the local prosecuting attorney, have the responsibility of identifying truants - i.e., children who are not in an approved education program. In most states local officials also have primary responsibility for approving home instruction programs, if allowed by state law, while state boards usually have responsibility for approving private schools. In some states, such as Ohio, the state board has gone so far as to charge local superintendents with the difficult task of interpreting judicial guidelines when granting or denying requests for exemption from the state's compulsory attendance law. In short, the compulsory school attendance system relies heavily on a good working relationship between state and local education officials.

The number of families desiring these "underground" education options seems to be growing. Observers of the phenomena also agree that it is impossible to ascertain even the numbers of children involved. The Census Bureau estimates that enrollment in non-Catholic nonpublic schools has increased from 615,548 to 1,433,000 from 1965 to 1975. But the Census Bureau probably has identified only the more formal and accredited schools. The real question concerns home instruction and small unaccredited schools, many of which do not seek and do not want state approval. A number of these schools are fundamentalist Christian schools that hold as a matter of faith that the state should have no authority over them and who refuse to provide information on themselves. Holt Associates (run by educator John Holt), provides support services to home schools, but has not attempted to estimate the number of pupils involved. It has received reports from various sources that suggest that the numbers could range anywhere from 10,000 to 100,000 nationwide. To further complicate the matter, the line between home instruction and small school is obscured by the fact that many "schools" are comprised of one family, with a parent as teacher, and located in a home.

With mere numbers so hard to come by, data on quality and thrust of underground education programs is even more difficult to obtain. Virginia Nordin and William Lloyd Turner have attempted to identify some of the fundamentalist Christian schools and observe the actual operation of these schools. Based on their personal observation and the scant data that are available, they have concluded, at minimum, that these schools are not segregationist academies. Rather, the founders of these schools are motivated by strongly-felt religious beliefs.

In virtually every state, enforcement of minimum standards for private education comes through the vehicle of compulsory attendance law, with possible punitive action for parents and

children, but not for those who run private schools. These state compulsory attendance requirements vary greatly. Typically these laws impose an obligation on both parents and children to cause the child to attend school. In virtually every state (except Mississippi) the law provides for fines and jail sentences for parents who fail to comply, and often truancy charges and possible commitment for the child. Here the similarity among state laws ends. Acceptable ways of meeting the schooling requirement vary widely from state to state. Some states require certification of teachers and schools, some only approval, and some, only minimal evidence that schooling takes place. Some states, such as North Carolina, have decided to deregulate all religious schools, but not other private schools. Many states permit home instruction by a parent or tutor. Others, like Nebraska, are actively enforcing their authority to require certification of teachers and approval of alternative education options.

As a general rule, states have full authority to set policy in education, and this includes the power to prescribe education for its young people. Further, most compulsory attendance laws have withstood constitutional challenge. However, educators find it nearly impossible to provide education without also imparting specific values. Consequently, in a nation that thrives on diversity, the underlying value system implicit in public school instruction and even in many accredited private schools may fail to satisfy all the families in a district. This situation raises several constitutional issues.

The limits on state authority have been explored only partially in a handful of U.S. Supreme Court decisions. In 1925 in Pierce v. Society of Sisters, the United States Supreme Court struck down an Oregon law that required attendance at public schools only. The Court held that the law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing of children under their control . . . " In Pierce the Court recognized as legitimate the interest of the state in compelling some form of schooling, although in the case before it the state had gone too far. Second, the contours of the "liberty of parents" to "direct the upbringing" of their children were undefined. The precise fact situation of Pierce has never reappeared. That is, no government since has attempted to eliminate private schools altogether.

In the same decade, the Supreme Court also dealt with two laws (in Nebraska and Hawaii) that were somewhat less drastic in effect than the law in Pierce, but still unreasonably burdened the right of parents to raise their children as they see fit. In Meyer v. Nebraska (1923), the Court struck down a state effort to forbid the teaching of foreign languages to children until after they had completed the eighth grade. The Nebraska Legislature thought this would assure the acquisition of patriotic values without interference from foreign values. A teacher was convicted for providing instruction in German in a private school. The

Supreme Court overturned the conviction and declared the law unconstitutional, holding that outlawing instruction in foreign language was not rationally related to the goal of cultivating good citizenship.

In Farrington v. Tokushige (1927), the Court struck down a Hawaii law regulating foreign language schools, on the grounds that it overregulated them. The foreign language schools in Hawaii (predominantly Japanese) were required to pay fees, submit numerous reports, establish their commitment to the "ideals of democracy", adhere to strict rules regarding when and how long the schools could operate each day, follow detailed regulations on textbooks and follow other detailed state regulations. The Court observed that "[e]nforcement of the Act would probably destroy most, if not all" of the affected schools.

Some further guidance can also be found in two recent cases involving federal regulation of church-run schools. In NLRB v. Catholic Bishop of Chicago (1979), the Court observed that first amendment rights are implicated upon enforcement of federal labor laws against a religious school, but decided the issue on statutory grounds. As a matter of statutory construction, the Court held that the National Labor Relations Act did not apply to church schools. This pattern was repeated last May in St. Martin Evangelical Lutheran Church v. South Dakota, involving federal and state unemployment taxes. Both cases follow a Supreme Court rule requiring courts to construe statutes in a way that enhances their constitutionality. It is quite possible that if these statutes could not be construed to exempt church schools, the Court would nonetheless have upheld them, but it did not have to decide the issue. These cases suggest that some regulation of private education may go too far, but provide no detailed guidance.

Finally, there may be situations where some families can claim a constitutional right to be excused from a compulsory attendance law because of their particular situation. This somewhat unusual constitutional rule developed first in a case involving a relatively minor interest of the state - a flag salute requirement - and a fairly clear constitutional right - the freedom of speech, which includes the right to remain silent. In West Virginia v. Barnette the law itself was found valid; but, as applied to particular people it was found invalid.

In 1972 the Supreme Court extended this concept of excusal to require excusal from the entire education program beyond the eighth grade for individuals with strong religious objections to public schooling. In Wisconsin v. Yoder, Amish families objected to the lack of Amish values in the public school program. However, they accepted compulsory public school attendance in lower grades on grounds that rudimentary instruction in basic skills was desirable for their children. The Court found that as applied to these people, Wisconsin's compulsory attendance law was unconstitutional. This holding does not affect state compulsory

attendance laws generally, not even Wisconsin's. Yoder narrowly holds that the state cannot compel attendance of children in the face of a severe conflict with their constitutional right to free exercise of religion, if the state's interest in the education of the child is otherwise adequately served. There are several points where the principles announced in Yoder can be extended. First, Yoder clearly can be extended beyond the Old Order Amish religion to other similarly-situated religions, perhaps even to non-theistic, non-traditional "religions." Second, it possibly could be extended to provide a wider basis for excusal than education beyond the eighth grade, if the standards of Yoder are otherwise met.

The first point relating to non-theistic religions is of minor significance at the present time, but could emerge as an issue in the future. It would clearly be an unconstitutional establishment of religion for a legislature or the courts to restrict the excusal granted in Yoder to a single religion. Further, the Supreme Court has consistently required that religion and non-religion be treated alike. For example, conscientious beliefs were equated with religious beliefs in the selective service cases -- cases dealing with a federal law excusing conscientious objectors from military service. In the selective service cases the court had defined "religious belief" as follows:

> . . . all sincere religious beliefs which are based upon a power or being, or upon a faith, to which all else is subordinate or upon which all else is ultimately dependent . . . A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by . . . God . . . .

Under Seeger, although the federal draft law appeared to require it, the Court found that a long religious tradition and history was not necessary. The Court deemed it necessary to adopt this broader interpretation of the law to avoid favoritism to persons with more traditional religious beliefs, in violation of the establishment clause. Curiously, this precedent was cited in Yoder only by dissenting Justice William O. Douglas.

While this possibility remains a plausible one, the Court in Yoder took great pains to limit the scope of its holding. The Court emphasized the long tradition (300 years) and obvious sincerity of Amish beliefs, and was careful to distinguish philosophical and religious objections to formal schooling:

> . . . if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claim would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and

such belief does not rise to the demands of the Religion Clauses.

The Chief Justice also warned that "it cannot be overemphasized that we are not dealing with a way of life and mode of education by a group claiming to have recently discovered some 'progressive' or more enlightened process for rearing children for modern life." Extensions of Yoder to non-theistic principles will have to await future Court decisions.

Lower courts have extended Yoder, if at all, only to persons with traditional theistic religious beliefs. Among the more successful of parents seeking expansion of Yoder was one who sent his seven-year old daughter to "Koppert's Korner" school, an Amish school which was neither chartered by the state nor taught by a certified teacher. The parent was not Amish, but asserted religious objections to the conduct, beliefs, dress and actions of people associated with the public schools, and asserted that the Amish school was the only school within reasonable distance that offered an education that was harmonious with his religious belief. The Ohio state court in Nagle v. Olin ruled that he was entitled to the protection offered by Yoder.

Another decision that extends the Yoder doctrine was made last year in Michigan v. Nobel. The state court found the state's interest in uniformity in education was not sufficiently compelling to justify enforcement of the compulsory attendance law against the Nobels. The parents were educating their children at home in a satellite school of the Christian Liberty Academy (headquartered in Chicago, Illinois). Michigan law permits home instruction, but only by certified teachers. Parents asserted their right to free exercise of religion, as in Yoder. Unlike Yoder, there was no showing based on a religious sect's history that the Nobels' system of home instruction was meeting the state's ultimate goals for compulsory attendance - such as the preparation of the student for a productive life and avoiding dependency on welfare. On the other hand, Mrs. Nobel had completed all the requirements essential to state certification of teachers, and refused to obtain her certificate for religious reasons, asserting the state had no authority to require it. Under such circumstances the court was reluctant to find a violation of the compulsory attendance law. (Under a Michigan attorney general ruling, home instruction by a certified teacher is equivalent to a private school.)

A similar extension of Yoder also was made in State v. Whisner, another Ohio case. In this case the court focused on the regulatory scheme imposed by the state. State regulations required private schools to devote 80% of the school day to specified academic subjects and 20% of the day to physical education, art, special activities and (as an option) applied arts. Religion was not mentioned. State law also broadly required private schools to meet whatever policies that the state

board promulgated. The court found that "The 'minimum standards' under attack herein effectively repose power in the state Department of Education to control the essential elements of non-public education . . . ." The court concluded that the state law and regulations, taken as a whole, unduly burdened the free expression of religion. The state board regulations in Ohio now require local superintendents to grant exemptions from the compulsory attendance law if the standards in Whisner are met.

Exemption was also extended in Kentucky State Board for Elementary & Secondary Education v. Rudasill. In Rudasill the court had before it a unique state constitutional provision that stated "nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed." The court concluded that this provision prevented the state from requiring parents to send their children to state-certified schools. This decision would not provide guidance in other states having no similar state constitutional provision.

In the fifth recent case won by families objecting to compulsory schooling as specified in state law, the issue turned on statutory interpretation. In State v. LaBarge the Vermont Supreme Court reviewed its compuslory attendance law and held it should not apply to the LaBarges. The state compulsory attendance law permitted education equivalent to that received in public schools. State and local officials believed that to require state approval of schools. In a decision reminiscent of Catholic Bishop of Chicago and St. Martin's Evangelical Church, the court avoided the constitutional issue and held simply that the statute did not require approval in the case before it.

An almost equal number of cases have upheld the regulatory schemes established in compulsory attendance laws. A number of these cases involve fundamentalist religious schools using the Accelerated Christian Education (A.C.E.) curriculum, consisting of a series of booklets called the Packet of Accelerated Christian Education (PACE), instructional information and self-administered tests. Each student is expected to work at his or her own pace, and upon attaining a score of at least 80% on the self test in a subject and a PACE test administered by a "monitor" or "supervisor" (the teacher), the student moves to the next level.

This was the curriculum used by the school in State v. Faith Baptist Church. The Nebraska Supreme Court upheld its state regulatory system. The court examined a number of the PACE tests, and generally the curriculum package appeared adequate. Defendant Faith Baptist Church indicated it would not request approval of the A.C.E. program, even though it was informally told that the state board would approve it. Second, the defendant school employed no certified teachers. It also refused to furnish local and state school officials with names and addresses of enrolled students, as required by state law. The defendants chose to rely instead upon an argument that the state has no authority

whatsoever over a religious school's operation. The defendants cited numerous passages from the Bible supporting their view that religion must be integrated into teaching. They also offered evidence of their belief that the public schools were inadequate to this task. Finally, the defendants asserted that public schools followed secular humanism as its basic philosophy.

The Nebraska high court relied heavily on the following passage from Pierce:

> No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Defendants relied heavily on Yoder, arguing that there must be a compelling state interest in the compulsory attendance law before it could be enforced against them. The Nebraska court concluded that the Yoder majority had balanced "the specific interest of the state in 1 or 2 years of education beyond the eighth grade for students not expected to enter the mainstream of modern-day life against competing religious principles and practices nearly 3 centuries old."

In State v. Shaver parents similarly sought excusal from the compulsory attendance law of North Dakota, and again sought to substitute the A.C.E. curriculum. Paul Shaver and Dennis Steinward sent their children to Bible Baptist School in Bismarck, a non-approved fundamentalist Baptist school. They cited numerous passages from the Bible in support of their views. The school in question used the A.C.E. correspondence curriculum. There were no certified teachers. The court examined Yoder and concluded that the defendants had the burden of establishing three elements before they could obtain excusal from a compulsory attendance requirement. First, their actions in defying the attendance law must be motivated by deeply rooted and sincerely held religious beliefs. Second, the free exercise of religion must in fact be burdened. Third, the state has no compelling interest that overrides the individual interest in the free exercise of religion. The court found that the defendant parents met the first requirement but not the second. In effect, the court was willing to question the link that defendants made between their religious belief and action. The court then assumed for sake of argument that free exercise was burdened and found the state's interest sufficiently compelling. Jail terms for parents' were upheld.

In two state cases parents asserted religious beliefs as their reason for violating compulsory attendance laws, but offered no evidence that they were providing any alternative education for the children. In both cases, convictions of the parents were upheld. In State v. Kasuboski, involving Wisconsin's compulsory attendance law, church leaders testified that the Life Science Church was not opposed to public education and that some members sent their children to public schools without ostracism by the church. However "auxiliary churches" could be formed and could formulate their own tenets, so long as they were not inconsistent with the tenets of the mother church. The Kasuboskis formed such an auxiliary church (the court record did not indicate if any other families were members) and formulated tenets that forbade sending children to public schools. They asserted religious objections to alleged teaching of humanism, racial equality and Jewish and communist influences in the public school system.

In Hill v. State a husband and wife were charged with violating Alabama's laws relating to contribution to the delinquency of a minor, because of a violation of the compulsory attendance law. The record indicated that the children were not receiving instruction in reading, spelling or mathematics. The father received a sentence of six months, of which three were suspended; the mother's sentence was for four months of which three were suspended.

This review of reported judicial opinions represents the tip of the iceberg. Cases are being filed in other states -- Iowa and New Hampshire, for example. Given the growth of the fundamentalist Christian schools, other private schools and home instruction, it is likely that many more of the "stricter" states will be faced with challenges to their compulsory attendance scheme in the future. More lenient states probably will avoid the pain of litigated challenges to their policies. In fact, the treatment in the 50 states of the "underground" school movement has varied widely.

North Carolina is at one end of the spectrum, with a 1979 law that deregulates all religious schools. Prior to passage of the law, the state board had gradually expanded its regulatory framework for private schools, until teachers, courses of study and textbooks had to be substantially the same as in the public schools. Under the new law, North Carolina has minimal requirements for recordkeeping (pupil attendance and disease immunization) and requires that the religious schools select and administer a nationally standardized test to students each year. The schools keep the tests on file and make them available to state inspectors. There is no explicit requirement that attendance records be subject to reporting or inspection. Eighth graders must be given a competency test. Finally, the school must meet fire, health and safety standards established in other laws.

Mississippi, like North Carolina, simply adopts a laissez faire attitude, but apparently for different reasons. (Mississippi abandoned its compulsory attendance law after Brown v. Board of Education, apparently not wishing to force children to attend desegregated schools. The recently enacted replacement has no sanctions and has a "sunset" date of July 1984.)

Washington, like North Carolina, has consciously deregulated private schools, but its law applies to all private schools, not just religious schools. The Washington law establishes minimum standards as to school year, length of day and subjects to be taught. It expressly provides that these minimum standards shall not be altered by state agencies. However, the Washington law continues to require teacher certification (except for courses in religion and other topics not taught in the public school) -- a sore point with the fundamentalist Christian schools and a stumbling block to many other private education alternatives as well. (The Washington law allows teaching by a person of "unusual competence," if supervised by a certified teacher, so in practice the state may allow more flexibility than would initially appear.)

This type of legislation would not be necessary, as a legal matter, if state law did not give the state board of education or other state administrative officials broad regulatory power in the first place. However, once given, it does become necessary to limit their power in this way if the state board has gradually increased requirements and if the state legislature does wish to make it clear that its minimum standards are to remain minimum standards, and not to be increased administratively.

States like Nebraska, North Dakota, Wisconsin and Alabama are at the other end of the spectrum, and have obtained state court approval of at least some aspects of the state's power to regulate private educational alternatives. Ohio is even more extreme, but its high court has curbed the state's regulatory scheme as applied to religious schools.

Home instruction is a somewhat different category, although the lines between it and a small private school are often blurred. Home instruction may be entitled to even more constitutional protection because the relation between the child and the parent is a very private one. This right to privacy is not a significant factor for schools where operators essentially enter into a contract with members of several families.

Laws in 35 states permit home instruction in some form or another. In some of these states, opinions from courts or attorneys general have authorized home instruction by ruling that the home can qualify as a school if it meets all of the requirements of a private school. In some states, such as Ohio, Oregon, and South Dakota this home instruction may be done by a parent or a qualified person. In other states, such as Colorado,

the teacher providing home instruction must be certified by the state. In Arizona home instruction must be by a "competent teacher." In Nevada, Oregon and Utah home instruction must be equivalent to that taking place in the public schools.

Some states require only that the child be educated, which taken literally could include instruction at home or anywhere. Connecticut, for example, requires only that parents educate or "cause" their children to be educated in specific subjects -- there is no school attendance requirement. Delaware law requires only that children be instructed "elsewhere" than the public school. Alabama requires education by a competent private tutor. Idaho, New Jersey, South Dakota and Vermont do not specify who must be the teacher or where instruction is to take place, but instruction apparently can be by anyone and anywhere so long as it is equivalent to that taking place in public schools. Georgia, Hawaii, New Mexico, and Tennessee allow state or local school officials to excuse a child from the compulsory attendance requirement.

Finally, Virginia and Kentucky expressly permit excusal from compulsory school attendance where the parent has conscientious objections to such attendance. In other states, courts have been willing to interpret federal or state constitutional provisions in a way that permits individual persons or religious schools to operate despite the state compulsory attendance law.

Oregon's compulsory attendance law is among the more interesting of state laws. Oregon permits home instruction by a parent or anyone else. Families must formally apply to school officials for permission. To assure that education does take place the law requires the state board to test the children periodically. However, the state board has delegated the task of granting permission and testing to local boards, making it extremely difficult to collect information on how the policy actually works. The ECS Law and Education Center informally interviewed local school officials in five major Oregon cities and learned little more. In Eugene, there are so many private and public alternative schools that apparently no one has sought the home instruction option. In the other cities, officials do not have testing data available yet.

The approach taken by North Carolina, Washington or Oregon provides a model for states wishing to be more flexible. Testing of the child in Oregon and North Carolina provides assurance that the children are being educated. Teacher certification is the mechanism used in Washington and reduces flexibility for private education alternatives. It is also a step nearer to the excessive regulation condemned in Tokushige. The Oregon law, which treats religious and secular schools alike avoid potential challenge based on favoritism to religious schools, a violation of the establishment clause of the first amendment. North Carolina's law, deregulating only private religious schools, is more

vulnerable to attack on this ground. Legislators wishing to create a more flexible system for private schools and to test the child to assure adequacy of the program may want to provide for more rigorous reporting requirements than exist in either North Carolina or Oregon, possibly making the testing a non-delegable responsibility of the state board. Legislatures could then monitor the actual educational progress of the children kept at home, and if unsatisfactory, could then revise the state regulatory scheme.

The scant amount of testing evidence thus far suggests that the underground alternatives are educationally adequate. In two litigated cases "before and after" scores from standardized tests were available. In a Nebraska case (In re Rice) a court found that a child kept in an unapproved school had made "remarkable progress" compared to her level of development in the public school. (The state had prosecuted parents under the child neglect statute, and the court held that violating the compulsory attendance law was not equivalent to child neglect.) The only other case reviewing standardized test scores was State v. Shaver, the North Dakota case. Again, the children did better in the unauthorized school.

In Faith Baptist, the Nebraska case, the school offered some weak evidence that the children were receiving an adequate education (testimony of a parochial school teacher), but the evidence was not based on standardized test scores. The court went on to comment on the inadequacy of testing as an alternative to compliance with the attendance law. The court's discussion reflects the limited role of the judiciary in policymaking. Courts cannot engraft such sweeping modifications on state law without serious questions about the separate role of courts and legislatures.

Legislators, on the other hand, are free to weigh the various private interests of families having strongly held religious views about education against the state's interests in assuring that all of its inhabitants are able to function as self-reliant and responsible citizens. This scant evidence suggests that periodic testing of those children placed in alternative education programs may be a viable alternative to compulsory school attendance. Some additional accounting would seem necessary in order to assure identification of children who are placed in private alternative programs. Where home instruction is chosen, registration may be necessary. Where individuals offer education services to others, additional considerations must be made. Is the "promotion" of the private school honest and fair to the parents? Is there full disclosure as to the qualifications of the teachers and the philosophy of the school? (Most states do not attempt to regulate fraud among private schools; if they do, they typically exclude private elementary and secondary schools.) Are health and safety conditions adequate? Testing of children may be coupled with minimal requirements as to subjects taught, time to be spent in

the program, and reporting requirements. These minimal requirements are well within the state's power.

Teachers' unions, which are staunch supporters of public school education and which may see alternative education schemes as a threat to their organizational base, are likely to oppose the relaxation of laws requiring certification of schools and teachers. They might argue that the state of the art in testing is inadequate to assure the public that an adequate education is taking place. While this is probably true, it could also be argued that teacher certification is no better. Usually teacher certification is dependent on completion of a degree, which in turn is dependent on passing final examinations in college courses. In some states it is also dependent on a test of the teacher's competency. In the end state legislators must decide whether testing the child or testing the teacher, or both, would provide adequate assurance that the child is being educated.

Local school officials also may oppose relaxation of existing laws. They too would be expected to be staunch supporters of public education, and genuinely suspicious of the academic and social implications of underground education alternatives. They may also be concerned over the loss of per pupil state aid when families chose private education alternatives. States sensitive to these problems could publish the data on testing, and indicate willingness to revise their policies for those children in private programs who are not doing as well as they would in public schools. States should recognized the problems caused by loss of per pupil aid to local districts and should explore constitutional ways to provide partial state aid where the local district makes its resources available to pupils in alternative education settings -- its libraries, physical education facilities, art facilities, testing and guidance services. To the extent that the local district can actually serve the "underground" education movement, it would not lose all its funds. The issue requires development of new laws, new regulations and new relationships between state and local education officials, and between public and private education systems.

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